

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DANIEL J. HEIMERMAN (DECEASED))	
Claimant)	
)	
V.)	
)	
NORTHERN CLEARING, INC.)	
Respondent)	Docket No. 1,066,885
)	
AND)	
)	
OLD REPUBLIC INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Pam Heimerman, widow of the decedent (hereinafter “claimant”), requested review of the June 10, 2016, Review and Modification Nunc Pro Tunc Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on September 1, 2016. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Brian Fowler of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The ALJ found that while he lacks jurisdiction to allocate damages in a third-party action, he has jurisdiction to review and modify the March 28, 2014, Agreed Award. The ALJ determined:

Without an apportionment of the damages recovered by claimant in the Federal District Court proceeding, the entire amount is subject to Respondent’s **K.S.A. 44-504(b)** lien, and the original Agreed Award must be modified as it is “excessive” to the extent that it fails to credit Respondent’s lien. [Emphasis in original.]

Respondent’s maximum liability is \$300,000.00 [**K.S.A. 44-510b(h)**] to Claimant, plus \$5,000.00 burial expenses and \$4,422.48 in medical expenses, for a total lien of \$309,422.48. That lien exceeds Claimant’s Federal District Court recovery of \$258,637.00 by **\$50,785.48**. Respondent is entitled to apply Claimant’s Federal District Court recovery to satisfy its lien. **Claimant’s counsel may be entitled to a reasonable attorney’s fee and expenses for obtaining the third party recovery for Respondent’s benefit.** [Emphasis in original.]

The Agreed Award of March 28, 2014 is hereby modified to give Respondent a lien for all amounts paid to date against the settlement proceeds in Claimant's counsel's trust account, and a credit against payments to be made in the future, up to a maximum of \$258,637.00. Respondent remains liable to Claimant for \$50,785.48 in workers compensation benefits to which she is entitled (assuming she does not die or remarry before these sums are paid), but which exceed her third party recovery.¹

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues it is premature to review and modify any death benefits because the apportionment issue is currently before the Kansas Court of Appeals. Claimant requests the Board vacate the ALJ's Award and remand the case to the ALJ pending the Court of Appeals' decision. Alternatively, claimant contends the Board should vacate the ALJ's Award to the extent it wrongly calculated the total credit due to respondent: the amount of \$258,637 has not been reduced to account for attorney fees, and the correct amount of credit due to claimant should be \$38,139.59.

Respondent argues its lien for compensation benefits attaches to the entirety of the third-party recovery. Further, respondent contends the ALJ's Award should be modified because respondent does not owe additional death benefits; however, respondent argues it is entitled to receive \$92,972.07 less reasonable attorney fees.

The issues for the Board's review are:

1. Did the ALJ have jurisdiction to address the lien and modify the Award, before the Court of Appeals has ruled on claimant's appeal of the district court's ruling that it did not have jurisdiction to apportion damages in a federal lawsuit?
2. Did the ALJ err in interpreting K.S.A. 44-504(b)?
3. Should respondent be granted a credit for 100 percent of the third-party settlement monies?

FINDINGS OF FACT

The decedent died in a work-related motor vehicle accident on August 31, 2013. Respondent paid to his surviving spouse (claimant) the initial lump sum (\$40,000), burial

¹ ALJ Nunc Pro Tunc Award (June 10, 2016) at 12.

expenses (\$5,000), and \$4,422.48 in medical expenses. The parties entered into an Agreed Award on March 28, 2014, providing for the payment of the balance of survivor's benefits in accordance with the Kansas Workers Compensation Act. Claimant was awarded \$300,000 in death benefits, to be paid at \$578 per week, and respondent retained its subrogation rights.

The decedent's adult son, a resident of Florida, initiated a wrongful death suit against the tortfeasors in the United States District Court of Kansas, which claimant joined on November 12, 2013.² Prior to her joining the federal action, claimant filed a Petition in the District Court of Allen County, Kansas, on September 13, 2013.³

In the Pretrial Order filed in the federal case,⁴ claimant claimed \$1,648,495.54 in total damages arising from the death, including loss of services in the amount of \$84,000 and \$250,000 in noneconomic losses, based on the report of her expert witness John Meara, CPA, ABV, CFE, CFF.⁵ Following mediation, the parties reached a settlement for the tortfeasors' policy limits, resulting in an amount of \$450,000 to be allocated to claimant and the decedent's surviving son. On February 23, 2015, a wrongful death apportionment hearing was held before U.S. District Judge Carlos Murguia.⁶

A Journal Entry of Judgment, entered March 4, 2015, approved the parties' settlement and apportioned damages between claimant and decedent's son, determining the division of attorney fees and litigation expenses. The Journal Entry stated:

17. The Court finds that counsel for Pamela Heimerman has incurred costs and expenses in the amount of FIFTEEN THOUSAND THREE HUNDRED FIFTY ONE DOLLARS and NINETY ONE CENTS (\$15,351.91) and those are fair and reasonable and should be reimbursed to counsel for Pamela Heimerman.

...

20. The Court finds that after costs, expenses and attorney fees are deducted TWO HUNDRED EIGHTY SEVEN THOUSAND THREE HUNDRED SEVENTY FOUR DOLLARS and FORTY FOUR CENTS (\$287,374.44) remains to be split between Lucas Heimerman and Pamela Heimerman.

² *Lucas Heimerman, et. al. v. Rose, et. al.*, United States District Court for the District of Kansas, Case No. 13-CV-2480.

³ *Heimerman v. Rose and Payless Concrete Products, Inc.*, Case No. 2013-CV-59.

⁴ See M.H. Trans., Ex. C at 8.

⁵ See M.H. Trans., Ex. T.

⁶ See M.H. Trans., Ex. S.

21. The plaintiffs have agreed that the TWO HUNDRED EIGHTY SEVEN THOUSAND THREE HUNDRED SEVENTY FOUR DOLLARS and FORTY FOUR CENTS (\$287,374.44) should be split with 90% (\$258,637) going to Pamela Heimerman and 10% (\$28,737.44) going to Lucas Heimerman and the Court finds that to be just, fair and equitable.

...

23. Any further causes of action, claims, or lawsuits brought by any heirs, if any, as defined by K.S.A. Section 60-1902 *et seq.*, against these defendants for the wrongful death of Dan Heimerman, arising out of the aforementioned accident, are forever barred, and the plaintiffs are ordered to execute a Release in favor of the defendants.

24. Pamela Heimerman and her attorney shall satisfy any and all valid liens, including the worker's compensation lien pursuant to K.S.A. 44-504.⁷

Following the Journal Entry, claimant unsuccessfully attempted to negotiate a resolution with respondent regarding its claimed \$300,000 workers compensation lien. On June 3, 2015, a motion hearing was held before the Honorable Daniel D. Creitz of the 31st Judicial District of Kansas (Allen County), on a Motion to Dismiss filed by the decedent's son in September 2014,⁸ alleging the Allen County lawsuit was prohibited by law given a wrongful death suit was already pending before the federal court when the Allen County suit was filed. Respondent filed a Motion to Intervene on June 5, 2015.⁹

Claimant filed a Motion to Apportion Net Settlement Monies and Determine the Validity of the Workers Compensation Lien Pursuant to K.S.A. 44-504(b) with the Allen County District Court on June 22, 2015. Claimant indicated the validity of the lien remained at issue because it had never been addressed by any court and that the issue had been reserved under the language of Paragraph No. 24 of the Journal Entry. Claimant contended the Allen County District Court should address the issue since the federal case was closed once the Journal Entry of Judgment was entered. Claimant requested the net settlement be apportioned to represent \$94,000 as recovery of loss of services and \$250,000 as recovery of loss of consortium, to be excluded from the workers compensation lien.¹⁰ On June 23, 2015, Judge Creitz indicated, "Except for a worker's compensation lien, the settlement in federal court appears to settle all claims."¹¹

⁷ M.H. Trans., Ex. F at 3-5.

⁸ See M.H. Trans., Ex. I.

⁹ See M.H. Trans., Ex. J.

¹⁰ See M.H. Trans., Ex. L at 4.

¹¹ M.H. Trans., Ex. K at 2.

Claimant filed a Motion to Dismiss in federal court.¹² On August 27, 2015, U.S. District Judge Murguia entered an Order denying claimant's motion as moot because dismissal was unnecessary. Judge Murguia noted:

At the apportionment hearing, the court approved the wrongful death settlement and apportioned the proceeds. No claims remained outstanding in the case. Although there may be some question over whether the Journal Entry of Judgment satisfied the "separate document" requirement of Federal Rule of Civil Procedure 58, any such question is now moot, as 150 days have run from the entry in the civil docket. See Fed. R. Civ. P. 58(c).¹³

On August 28, 2015, respondent filed a Motion to Dismiss and/or Stay with the Allen County District Court, noting the proper venue to determine and apply the lien is the Division of Workers Compensation:

Since Ms. Heimerman continues to receive benefits pursuant to the Award by the Division of Workers' Compensation, only the Division can enter to terminate these benefits. The Division also have [sic] original jurisdiction to determine subrogation interests.¹⁴

A motion hearing was held before Judge Creitz on September 2, 2015.¹⁵ In his ruling of September 23, 2015, Judge Creitz dismissed the case with prejudice:

The decision in federal court did not apportion damages. Final judgment in federal district court is in place and remains in place. Here the federal court has previously denied relief to alter or amend its order. The federal settlement does not provide that it is for loss of consortium. There is no language reserving or allowing another court, this court, to apportion the damages for loss of consortium. This is not an action by a third party seeking to enforce a lien.¹⁶

Claimant appealed Judge Creitz' ruling to the Kansas Court of Appeals on December 14, 2015.¹⁷

¹² Claimant did not enter this Motion to Dismiss into evidence. (See M.H. Trans. at 12-13.)

¹³ M.H. Trans., Ex. P at 2.

¹⁴ M.H. Trans., Ex. N at 2,

¹⁵ See M.H. Trans., Ex. O.

¹⁶ M.H. Trans., Ex. Q at 6.

¹⁷ Appellate Case No. 114,890.

Claimant requested the federal court reopen her case to conduct an evidentiary hearing to address the validity of the workers compensation lien, but was denied by Judge Murguia on February 10, 2016. Judge Murguia noted the case did not present the exceptional circumstances necessary to allow renewed litigation.¹⁸

Respondent filed an Application for Review and Modification with the Division on August 18, 2015. ALJ Moore entered his original Award on May 25, 2016, followed by his Award Nunc Pro Tunc on June 10, 2016. Claimant timely appealed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-504(b) states:

In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees. Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker's dependents or personal representative prior to the completion of compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid. Such action against the other party, if prosecuted by the worker, must be instituted within one year from the date of the injury and, if prosecuted by the dependents or personal representatives of a deceased worker, must be instituted within 18 months from the date of such injury.

Based on the facts, the lien amount cannot exceed \$258,637.00, the amount of claimant's recovery in the third-party action.¹⁹

The Board agrees with claimant's argument that it is premature for the Division of Workers Compensation to rule on the amount of the K.S.A. 2013 44-504(b) lien. The amount of the lien is dependent on resolution of the parties' arguments currently pending

¹⁸ See M.H. Trans., Ex. S at 3.

¹⁹ The reference on Page 12 of the ALJ's Review and Modification Order to a lien of \$309,422.48 is incorrect, but the proper lien amount of \$258,637.00 is listed on Page 13 of the ALJ's Order.

before the Kansas Court of Appeals, including whether the lien is “valid” and whether the Allen County District Court should determine if the lien should be reduced by any amounts for loss of consortium or loss of service to a spouse. Determination of the lien amount will be a ripe issue only in the event these matters are addressed through the appeals process and perhaps following remand to the district court.

While the Board has jurisdiction to address the lien amount, we do not have jurisdiction to address whether there should be a deduction of the lien based on loss of consortium or loss of service to a spouse. If the Board was to assume the entire amount from the third-party case is the amount of the lien, we run the risk of a contrary ruling from the appellate courts or the Allen County District Court. The Board vacates the ALJ’s ruling because determining the disputed issues is premature and not yet ripe.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated June 10, 2016, is vacated.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
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Hon. Bruce E. Moore, Administrative Law Judge